

IN THE SUPREME COURT OF MISSISSIPPI

NO: 2008-CA-01617

DIANN AND DAVID HANS

APPELLANTS

VERSUS

~~MEMORIAL HOSPITAL AT GULFPORT~~  
ARTHUR SPROLES MD AND JAMES LOVETTE MD


~~APPELLEES~~

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Diann and David Hans, Appellants.
2. Robert O. Homes, Esq., Attorney for Appellants.
3. Memorial Hospital at Gulfport, Appellee.
4. Patricia K. Simpson, Esq., Franke & Salloum PLLC, Attorney for Appellee, Memorial Hospital at Gulfport.
5. Fredrick B. Feeney, III, Esq., Franke & Salloum PLLC, Attorney for Appellee, Memorial Hospital at Gulfport.
6. Karen K. Sawyer, Esq., Copeland, Cook, Taylor & Bush, Attorney for Appellee, James Lovette, MD.
7. William E. Whitfield III, Esq., Copeland, Cook, Taylor & Bush, Attorney for Appellee, James Lovette MD.
8. George F. Bloss, Esq., Watkins, Ludlam, Winter & Stennis, Attorney for Appellee, Arthur Sproles, MD.

9. Mary Margaret Kuhlmann, Esq., Watkins, Ludlam, Winter & Stennis, Attorney  
for Appellee, Arthur Sproles, MD.
10. Honorable Jerry O. Terry, Circuit Judge.



---

Patricia K. Simpson, Esq.

FRANKE & SALLOUM PLLC  
2605 Fourteenth Street  
Post Office Drawer 460  
Gulfport, MS 39502  
Tel: 228-868-7070  
Fax: 228-868-7090

IN THE SUPREME COURT OF MISSISSIPPI

NO: 2008-CA-01617

DIANN AND DAVID HANS

APPELLANTS

VERSUS

MEMORIAL HOSPITAL AT GULFPORT,  
ARTHUR SPROLES MD AND JAMES LOVETTE MD

APPELLEES

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE ISSUES .....	vi
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
CONCLUSION .....	14

IN THE SUPREME COURT OF MISSISSIPPI

NO: 2008-CA-01617

DIANN AND DAVID HANS

APPELLANTS

VERSUS

MEMORIAL HOSPITAL AT GULFPORT,  
ARTHUR SPROLES MD AND JAMES LOVETTE MD

APPELLEES

TABLE OF AUTHORITIES

STATE CASES

<i>Barner v. Gorman</i> , 605 So. 2d 805 (Miss. 1992) .....	9, 10
<i>Boyd v. Lynch</i> , 493 So.2d 1315 (Miss. 1986) .....	5
<i>Brooks v. Roberts</i> , 882 So.2d 229, 232 (Miss. 2004) .....	7
<i>Brown v. Credit Card Center, Inc.</i> , 444 So.2d 358 (Miss. 1983) .....	5
<i>Cheeks v. Bio-Medical Applications, Inc.</i> , 908 So.2d 117 (Miss. 2005) .....	12
<i>Clayton v. Thomas</i> , 475 So. 2d 439, 445 (Miss. 1985) .....	10
<i>Drummond v. Buckley</i> , 627 So. 2d 264 (Miss. 1993) .....	9, 10
<i>Eagle Management LLC v. Parks</i> , 938 So. 2d 899 (Miss. App. 2006) .....	13
<i>Erby v. North MS Medical Center</i> , 654 So.2d 495 (Miss. 1995) .....	5
<i>Estate of Deiorio v. Pensacola Health Trust Inc.</i> , 990 So. 2d 804 (Miss. App. 2008) .....	6
<i>Franklin Collection Service, Inc. V. Kyle</i> , 955 So.2d 284 (Miss. 2007) .....	6
<i>Hubbard v. Wansley</i> , 954 So. 2d 951 (Miss. 2007) .....	11
<i>J.N.W.E. v. W.D.W.</i> , 922 So. 2d 12 (Miss. App. 2006) .....	13

<i>Jones v. Fluor Daniel Servs. Corp.</i> , 959 So. 2d 1044, 1048 (Miss. 2007) .....	14
<i>Latham v. Haynes</i> , 495 So. 2d 453 (Miss. 1986) .....	9, 10
<i>Mallet v. Carter</i> , 803 So. 2d 504 (Miss. Ct. App. 2002) .....	10
<i>McNeil v. Hester</i> , 753 So. 2d 1057, 1075 (Miss. 2000) .....	13
<i>Palmer v. Biloxi Regional Medical Center</i> , 564 So.2d 1346 (Miss. 1990) .....	5, 9
<i>Phillips v. Hull</i> , 516 So. 2d 488 (Miss. 1987) .....	9
<i>Powell v. Methodist Health Care Jackson Hospitals</i> 876 So. 2d 347 (Miss. 2004) .....	10
<i>Scales v. Lackey Memorial Hospital</i> , 988 So. 2d 426 (Miss. App. 2008) .....	6
<i>Troupe v. McCauley</i> , 955 So.2d 848 (Miss. 2007) .....	7, 9, 10
<i>Tunica County v. Matthews</i> , 926 So. 2d 209, 213 (Miss. 2006) .....	10
<i>United Plumbing &amp; Heating Co. Inc. v. Mosley</i> , 835 So. 2d 88 (Miss.App. 2002) .....	13
<i>Varvaris v. Perrault</i> , 813 So. 2d 750 (Miss. App. 2001) .....	13

## COURT RULES

<i>M.R.C. P. Rule 56(e)</i> .....	3, 6
<i>Miss. R. Evid. 702</i> .....	7, 8

IN THE SUPREME COURT OF MISSISSIPPI

NO: 2008-CA-01617

DIANN AND DAVID HANS

APPELLANTS

VERSUS

MEMORIAL HOSPITAL AT GULFPORT,  
ARTHUR SPROLES MD AND JAMES LOVETTE MD

APPELLEES

**STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT WAS CORRECT IN FINDING THAT THE AFFIDAVIT PROVIDED BY HANS WAS NOT IN COMPLIANCE WITH RULE 56(E)
- II. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT AS HANS FAILED TO PROVIDE EXPERT TESTIMONY DEFINING THE STANDARD OF CARE AND FAILED TO PRODUCE EVIDENCE OF CAUSATION IN SUPPORT OF HER MEDICAL MALPRACTICE CLAIMS
- III. THE FAILURE OF HANS TO PROVIDE AUTHORITY IN SUPPORT OF HER ARGUMENTS AND THE RAISING OF THE ARGUMENTS FOR THE FIRST TIME ON APPEAL PRECLUDES REVIEW BY THIS COURT

IN THE SUPREME COURT OF MISSISSIPPI

NO: 2008-CA-01617

DIANN AND DAVID HANS

APPELLANTS

VERSUS

MEMORIAL HOSPITAL AT GULFPORT,  
ARTHUR SPROLES MD AND JAMES LOVETTE MD

APPELLEES

**STATEMENT OF THE CASE**

Hans' Complaint against Memorial Hospital at Gulfport ("MHG") was filed on March 29, 2007 in the Circuit Court of Harrison County, First Judicial District. (R. 16) MHG timely filed its Answer. (R. 54) MHG filed a Motion for Summary Judgment on March 10, 2008. (R. 276) MHG filed an Amended Motion for Summary Judgment on April 21, 2008. (R. 361) A hearing was held on the amended motion and the trial court granted the motion from the bench on July 25, 2008 (TR. 25) . The trial court requested a prepared order and Hans filed a motion for reconsideration on August 1, 2008. (R. 660) The trial court entered its order granting summary judgment in favor of MHG and denying the motion for reconsideration on September 3, 2008. (R. 672, 677) Hans then filed her Notice of Appeal. (R. 682)

**STATEMENT OF FACTS**

In her complaint, the Plaintiff alleged that MHG was negligent when it failed to provide Hans proper and adequate care and treatment by (a) failing to preliminarily determine in a proper manner the extent of her injury or illness and the extent and speed of treatment needed; (b) failing to provide the emergency treatment called for; (c) failing to follow the directions of Hans'

personal physician and (d) failing to contact the physician on call or needed to perform surgery as required in a timely and adequate manner. (R. 17-18) Hans alleges that she presented to the emergency room on April 6, 2006 at 11:14 am with complaints of abdominal pain. (R. 403) She was evaluated at MHG and diagnosed with appendicitis. (R. 402) The ER personnel contacted Dr. Arthur Sproles, a general surgeon. (R. 402) At 9:55 pm, Dr. Arthur Sproles, the surgeon, admitted Hans to the hospital and scheduled her for surgery the next morning. (R. 402) Hans underwent surgery the following morning and was discharged from the hospital a few days later. Emergency room physicians do not admit patients into the hospital nor do they schedule surgeries. (R. 396-397) Hans filed her complaint against MHG, James Lovette and Arthur Sproles. Drs. Sproles and Lovette were voluntarily dismissed. (R. 65, 67)

Discovery proceeded for over a year. MHG served discovery requests upon the Plaintiffs requesting that they identify their expert witnesses, the standards of care that they allege MHG breached and that they identify the negligent actions or omissions on behalf of MHG which the Plaintiffs contended caused some damage to them. (R. 413-417) The Complaint failed to allege any specific act or omission by an employee of MHG that caused damages to the Plaintiff. (R. 16-20) The responses to discovery by the Plaintiffs failed to identify any specific act or omission on behalf of MHG which breached the standard of care and caused damage to the Plaintiffs. (R. 413-417) In addition, the Plaintiffs failed to identify any expert witnesses. (R. 413) MHG filed a motion for summary judgment contending that, after a year of litigation, the Plaintiffs failed to identify any expert witnesses to testify that MHG breached the standard of care in its treatment of Hans. (R. 276-300) Supplemental responses to discovery were served by the Plaintiffs after MHG filed its motion for summary judgment which identified Dr. William Hale, a



gastroenterologist, but did not identify any act or omission on behalf of MHG that caused damage to the Plaintiffs. (R. 355-360) MHG filed its amended motion for summary judgment contending that the Plaintiffs failed to identify what acts or omissions on behalf of MHG breached any standard of care which caused damage to Hans and failed to provide expert testimony to support their claims. (R. 361-420) The Plaintiffs filed a response to the amended motion but provided no affidavits, discovery responses, documents or testimony to support their contentions. (R. 495-500) On the eve of the hearing, the Plaintiffs filed an affidavit to supplement their response to MHG's amended motion for summary judgment. (R. 651-655) MHG filed its objections to the affidavit immediately and the trial court heard arguments that morning. (R. 656-659) The trial court granted summary judgment in favor of MHG and denied Hans' motion for reconsideration. (R.673-678)

#### **SUMMARY OF THE ARGUMENT**

*M.R.C. P. Rule 56(e)* provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." *M.R.C.P. 56(e)*. Mississippi law requires that a party opposing a motion for summary judgment should respond to such motions with affidavits, deposition testimony, responses to discovery and other evidence approved by the governing rule of civil procedure to demonstrate whether triable issues of material facts exist. Parties are not permitted to simply rely on their pleadings, nor may they escape summary judgment by outlining what evidence they might discover later.

As a matter of law, the affidavit provided by Hans failed to meet the standards required by *M.R.C.P. 56(e)* and failed to establish a prima facie case of medical malpractice against MHG. The affidavit was not made upon personal knowledge and failed to set forth facts that

would be admissible in evidence in this case. The affidavit failed to show affirmatively that the affiant was competent to testify to the matters stated within it. Hans has failed to provide *any* evidence or information that Dr. Hale is sufficiently versed in emergency room medicine in order to provide any opinions regarding Hans' treatment in the emergency room at MHG.

Assuming that Dr. Hale is competent to opine as to the standard of care in this case and considering the affidavit in the light most favorable to Hans, the affidavit presented by Hans fails to establish a prima facie case of medical malpractice against MHG. Mississippi law provides that expert testimony is required to identify and articulate the requisite standard of care that was not complied with and is necessary to establish that the failure to comply with the standard of care was the proximate cause of the alleged injuries. It is required that the expert specifically define what actions breached the standard of care and how such breach caused the plaintiff's injuries. This is done with expert testimony that identifies specific facts and medical analysis to substantiate the plaintiff's claim and demonstrate causation.

Reviewing the submission in the light most favorable to the Plaintiff, the affidavit fails to articulate what was required of MHG except to make a blanket statement that a delay occurred after Hans' appendicitis diagnosis. Nothing provided in the affidavit specifies *who* violated the standard of care, *how* the standard of care was violated or *what* is required by the standard of care. In addition, the affidavit does not contain *any* facts relating to any treatment of Hans received from MHG and thus a prima facie case of medical malpractice has not been established. The trial court was correct in granting summary judgment in favor of MHG in this case.

## **ARGUMENT**

### **Standard of Review**

In a summary judgment proceeding, the Plaintiff must rebut the Defendant's claim (i.e.,

that no genuine issue of material fact exists) by producing supportive evidence of *significant* and *probative* value; this evidence must show that the Defendant breached the established standard of care and that such breach was the proximate cause of the Plaintiff's injury. *Palmer v. Biloxi Regional Medical Center*, 564 So.2d 1346, 1355 (Miss. 1990). The summary judgment movant has a burden of persuasion; a burden to establish that there is no genuine issue of material fact to be tried. The party opposing the motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues. *Erby v. North MS Medical Center*, 654 So.2d 495, 499 (Miss. 1995).

This Court conducts a *de novo* review of a lower court's grant of summary judgment. *Id.* at 499. The trial judge's decision will be reversed if a triable issue of fact exists; otherwise, the decision of the lower court will be affirmed. *Id.* citing *Brown v. Credit Card Center, Inc.*, 444 So.2d 358 (Miss. 1983). This Court has recognized on numerous occasions the correctness of a trial court's decision to extinguish by summary judgment or directed verdict a claim of medical negligence prior to submission of a case to a jury. *Boyd v. Lynch*, 493 So.2d 1315, 1318 (Miss. 1986).

**THE TRIAL COURT WAS CORRECT IN FINDING THAT THE AFFIDAVIT PROVIDED BY HANS WAS NOT IN COMPLIANCE WITH RULE 56(E)**

It cannot be overlooked that the only evidence the Plaintiff provided to rebut MHG's amended motion for summary judgment was the last minute submission of the Affidavit of Dr. William Hale. (R. 651). On the eve of the hearing on MHG's amended motion for summary judgment, Hans filed a last minute affidavit in opposition to MHG's motion. (R. 651) MHG immediately filed its objections to the admission of the affidavit and the trial court heard the matter at the hearing the following morning. (R. 656-659, TR. 1-25) After hearing arguments

regarding MHG's objection to the affidavit and motion, the trial court found that the affidavit submitted by the Plaintiff failed to articulate the standard of care the Plaintiffs allege was breached by MHG. (R. 675). The trial court found that the affidavit failed to articulate how the standard of care was breached and by whom. (R. 675).

*M.R.C. P. Rule 56(e)* provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." *MRCP 56(e)*. This Court has mandated that parties should respond to summary judgment motions with affidavits, deposition testimony, responses to discovery and other evidence approved by the governing rule of civil procedure, whether triable issues of material facts exist; parties may not simply rely on their pleadings, nor may they escape summary judgment by outlining what they might discover later. *Franklin Collection Service, Inc. V. Kyle*, 955 So.2d 284, 291 (Miss. 2007). The submission by the Plaintiff in this case failed to provide legally sufficient evidence that a genuine issue of material fact exists. The trial court ruled that the affidavit submitted at the last minute by the Plaintiffs failed to comply with the requirements of *M.R.C.P. 56(e)*. (R. 673-676)

As a matter of law, the affidavit provided by Hans failed to meet the standards required by *M.R.C.P. 56(e)* and failed to establish a prima facie case of medical malpractice. This Court has held that affidavits from experts must state their opinions to a reasonable medical probability or certainty. *Estate of Deiorio v. Pensacola Health Trust Inc.*, 990 So. 2d 804, 807 (Miss. App. 2008) A defendant in a medical malpractice action may meet its summary judgment burden by pointing out to the court that the plaintiff has failed to produce sworn expert testimony supporting his allegations. *Scales v. Lackey Memorial Hospital*, 988 So. 2d 426, 433 (Miss. App. 2008) Dr. Hale's affidavit in this case does not even aver that he is a medical doctor who

is competent to testify in this case based upon his medical knowledge, training, experience or education. It does not aver that he has any personal knowledge of the facts of this case. It does not identify any facts relating to this case. There is no mention that he reviewed the medical records of Diann Hans or that he reviewed any depositions, discovery responses or any documents to formulate his opinions. There is no factual basis presented in the submission from which it can be determined how he determined that MHG breached any standard of care in its treatment of Hans. It does not define what the standard of care requires of the emergency room providers. It does not define or point to any fact in this case as to how any emergency room provider failed to comply with the standard of care in this case. Finally, the affidavit does not identify any training, experience or education on behalf of Dr. Hale that would illustrate that he is competent to testify regarding the standard of care in emergency room medicine.

Pursuant to *MRE 702 (amended 2003)*:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

*MRE 702*

It is this Court's general rule that in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care.

*Brooks v. Roberts*, 882 So.2d 229, 232 (Miss. 2004). A physician who is sufficiently "familiar with the standards of a medical specialty may testify as an expert even though he does not practice the specialty himself." *Troupe v. McCauley*, 955 So.2d 848, 856 (Miss. 2007).

However, he must demonstrate that he is sufficiently familiar with the standards of the medical

specialty by knowledge, skill, experience, training or education in accordance with MRE 702. *Id.*

It is MHG's contention that Dr. Hale's affidavit failed to provide sufficient admissible evidence that Dr. Hale was competent to testify as an expert in this case. While MHG acknowledges that its motion was not Daubert challenge, Hans was required to provide sufficient evidence to demonstrate that she retained an expert witness who could define and articulate the standard of care she claimed was breached by MHG that caused her injury. She failed to do so in this case. As indicated in her interrogatory answers, which MHG reminds the court is **NOT** sworn expert testimony, Dr. Hale serves as Chief of Gastroenterology and Hepatology at Norwalk Hospital in Connecticut. (R. 357-359) According to his resume, he has practiced in the field of gastroenterology his entire career and has never practiced emergency room medicine. In addition, he has no emergency room training or experience specified on his resume. There is no experience, training or skill provided in the affidavit or interrogatory responses that demonstrates Dr. Hale's familiarity with the standards of emergency room medicine by knowledge, skill, experience, training or education in accordance with *Miss. R. Evid. 702*. Hans has failed to provide *any* evidence or information that Dr. Hale is sufficiently versed in emergency room medicine in order to provide any opinions regarding Hans' treatment in the emergency room at MHG. Since Hans failed to provide expert testimony in support of her claims against MHG, MHG is entitled to summary judgment and the trial court did not err in granting summary judgment to MHG in this case.

**THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT AS HANS FAILED TO PROVIDE EXPERT TESTIMONY DEFINING THE STANDARD OF CARE AND FAILED TO PRODUCE EVIDENCE OF CAUSATION IN SUPPORT OF HER MEDICAL MALPRACTICE CLAIMS**

Unless an issue under consideration in a medical malpractice action is within the common

knowledge of laymen, expert testimony is required. *Palmer v. Biloxi Regional Medical Center*, 564 So. 2d 1346, 1355 (Miss. 1990) Case law requires that in a medical malpractice action, negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care. *Id. at 1355* An expert is necessary to determine the applicable standard of care that the hospital's actions breached the standard of care and that such breach was the proximate cause of the plaintiff's injuries. *Palmer at 1355; also citing Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987)

Not only must a plaintiff prove those elements in a medical malpractice suit, but expert testimony must be used. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992) Expert testimony is required to identify and articulate the requisite standard of care that was not complied with and is necessary to establish that the failure to comply with the standard of care was the proximate cause of the alleged injuries. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992); *see also Latham v. Haynes*, 495 So. 2d 453 (Miss. 1986) The Plaintiff's failure to establish a *prima facie* case with expert testimony warrants the granting of summary judgment. *Id.* The Plaintiff's failure to provide expert opinion evidencing causation is fatal to her case. *Drummond v. Buckley*, 627 So. 2d 264 (Miss. 1993)

The Mississippi Supreme Court has mandated that to present a *prima facie* case of medical malpractice a plaintiff must, (1) after establishing the doctor-patient relationship and its attendant duty, present expert testimony (2) identifying and articulating the requisite standard of care; and (3) establishing that the defendant physician failed to conform to the standard of care. In addition, (4) the plaintiff must prove the physician's noncompliance with the standard of care caused the plaintiff's injury, as well as proving (5) the extent of the plaintiff's damages. *Troupe*

*v. McAuley*, 955 So. 2d 848, 856 (Miss. 2007) In *Troupe*, the Court held that a physician who is sufficiently “familiar with the standards of a medical specialty may testify as an expert even though he does not practice the specialty himself”. *Id.* However, that expert must exercise the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

*Id. at 858*

It is longstanding law that a plaintiff claiming medical malpractice must show that there is a causal connection between the injury and the defendant’s conduct or acts. *Powell v.*

*Methodist Health Care Jackson Hospitals* 876 So. 2d 347, 348 (Miss. 2004). The Plaintiff’s failure to provide expert opinion evidence establishing causation is fatal to their case.

*Drummond v. Buckley*, 627 So. 2d 264 (Miss. 1993); *see also Clayton v. Thomas*, 475 So. 2d 439, 445 (Miss. 1985) The party offering the expert testimony must show that the expert based his conclusions not on opinions or speculation, but rather on scientific methods and procedures.

*Tunica County v. Matthews*, 926 So. 2d 209, 213 (Miss. 2006)

Assuming that Dr. Hale is competent to opine as to the standard of care in this case and considering the affidavit in the light most favorable to Hans, the affidavit presented by Hans fails to establish a prima facie case of medical malpractice against MHG. Mississippi law provides that expert testimony is required to identify and articulate the requisite standard of care that was not complied with and is necessary to establish that the failure to comply with the standard of care was the proximate cause of the alleged injuries. *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992); *see also Latham v. Haynes*, 495 So. 2d 453 (Miss. 1986) An expert is necessary to determine the applicable standard of care and such expert must define what the standard of care is. *Mallet v. Carter*, 803 So. 2d 504, 508 (Miss. Ct. App. 2002) It is also necessary that the



expert specifically define what actions breached the standard of care and how such breach caused the plaintiff's injuries. *Id.* This includes providing testimony with specific facts and medical analysis to substantiate the claim that a plaintiff had a greater than fifty percent chance of substantial recovery if he had received the care the expert contends was required. *Hubbard v. Wansley*, 954 So. 2d 951, 965-966 (Miss. 2007)

It cannot be overlooked that Dr. Hale's written letters do not opine that MHG breached the standard of care in this case. In fact, it specifically says that "[a]lthough the diagnosis of appendicitis was suspected clinically and confirmed radiologically in an appropriately prompt fashion, there was a significant delay before she was evaluated by a surgeon, Dr. Arthur Sproles, and a further delay before an appendectomy was performed". (R. 653) As indicated in MHG's amended responses to interrogatories, emergency room physicians do not admit patients to the hospital and the physician admitting the patient assumes the care of the patient. (R. 379-400) Dr. Sproles admitted Hans to the hospital at 2155 (9:55 pm) on April 6, 2006. (R. 404) Emergency room physicians do not operate on patients or determine a patient's surgery schedule. (R. 396-400) Hans has provided no sworn evidence that MHG failed to comply to any standard of care when Dr. Sproles assumed care of the patient at 2155 that evening. Dr. Hale's "written report" does not specify any act or omission by anyone at MHG which caused damage to Hans. In fact, it purports to say that Hans was diagnosed in an appropriately prompt fashion. Any opinion regarding when Dr. Sproles evaluated his patient or performed surgery on his patient does not involve MHG as it is undisputed that Dr. Sproles is not an employee or agent of MHG.

Reviewing the submission in the light most favorable to the Plaintiff, the affidavit fails to articulate what was required of MHG except to make a blanket statement that a delay occurred

after Hans' appendicitis diagnosis. (R. 652). Nothing in the "exhibits" to Hale's affidavit specifies *who* caused a delay or *how* any alleged delay was caused. Dr. Hale doesn't identify any medical providers by name or service other than Dr. Sproles. It is undisputed in this case that Dr. Sproles is not an employee or agent of MHG. In addition, the "exhibits" do not contain *any* facts relating to any treatment of Hans received from MHG. At a bare minimum, the Plaintiff's expert should be required to articulate what treatment constitutes the standard of care that should be provided by a minimally competent provider and how the Defendant failed to conform to that standard of care. *Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117, 120 (Miss. 2005). Dr. Hale's letter of March 24, 2008 states "[t]hese delays were negligent and unreasonable and were the result of failure to follow accepted medical practice." (R. 652) Hans claims this is sufficient to define the standard of care and the breach. However, the letter does not articulate what constitutes "accepted medical practice". It doesn't even define "significant delay" in this case or how any such delay was the result of a failure to follow acceptable medical practice on the part of MHG. It does not identify what medical provider delayed in providing what treatment to Hans which caused her injury. Was an emergency room physician negligent? Was an emergency room nurse negligent? Was an emergency room technician negligent? The blanket statements of negligence at this stage of the litigation are unacceptable and Hans had a responsibility to provide the trial court with probative evidence legally sufficient to make apparent the existence of triable fact issues. She failed to do so and the trial court was correct when it granted summary judgment in favor of MHG.

**THE FAILURE OF HANS TO PROVIDE AUTHORITY IN SUPPORT OF HER ARGUMENTS AND THE RAISING OF THE ARGUMENTS FOR THE FIRST TIME ON APPEAL PRECLUDES REVIEW BY THIS COURT**

It would be error for this Court to examine Hans' arguments on the issue of whether the trial court properly ruled that she failed to articulate and define the standard of care in this case without requiring her to provide authority in support of her position. It is long standing law that the failure of an appellant to cite authority in support of an assignment of error constitutes a procedural bar and waives the argument on that issue. *J.N.W.E. v. W.D.W.*, 922 So. 2d 12, 19-20 (Miss. App. 2006) citing *Varvaris v. Perrault*, 813 So. 2d 750, 753 (Miss. App. 2001); *Eagle Management LLC v. Parks*, 938 So. 2d 899, 903 (Miss. App. 2006); *United Plumbing & Heating Co. Inc. v. Mosley*, 835 So. 2d 88, 92 (Miss.App. 2002) While a party may cite authority for different issues, if an appellant fails to provide authority in support of each individual issue, said assignment of error is procedurally barred. *McNeil v. Hester*, 753 So. 2d 1057, 1075 (Miss. 2000).

Hans provides no authority in support of her contentions that Dr. Hale was qualified to provide opinions or that the affidavit submitted satisfied the requirements of *M.R.C.P. 56(e)*. In addition, Hans fails to cite any authority in support of her contention that Dr. Hale's "affidavit" which was submitted at the last minute clearly established a prima facie case against MHG. Hans failed to cite any authority in support of her arguments that her submission in opposition to MHG's summary judgment motion articulated and defined a standard of care that she contends MHG breached which caused her injury. Hans provides no authority in support of her argument

that the evidence she provided to the trial court sufficiently established a prima facie case of medical malpractice against MHG.

Hans raises an issue regarding a call schedule on appeal for the first time. These issues were not presented to the trial court nor was any evidence relating to these issues provided in Hans' submissions to the trial court. This Court should not consider these issues in this appeal. It is mandatory that the trial court be given the chance to rule on the issue. *Jones v. Fluor Daniel Servs. Corp.*, 959 So. 2d 1044, 1048 (Miss. 2007) There was no evidence presented by Hans *at all* regarding a problem with any on-call schedule to the trial court. In fact, no evidence of any call schedule was presented to the trial court in this case. (R. 349-352, 353-360, 495-500) As such, this Court should not consider any argument on issues brought for the first time by Hans in this appeal since the trial court did not have an opportunity to rule on such an issue. MHG should not be penalized for Hans' failure to provide probative evidence demonstrating genuine issues of material fact for trial.

### CONCLUSION

The affidavit submitted by Hans in this case failed to provide legally sufficient evidence that a genuine issue of material fact exists. The trial court was correct when it ruled that the affidavit submitted at the last minute by Hans failed to comply with the requirements of *M.R.C.P. 56(e)*. Hans has failed to identify expert testimony pursuant to Rule 26 of the Mississippi Rules of Civil Procedure and MRE 702. Hans has failed to offer any sworn testimony which identifies the applicable standard of care with respect to MHG which supports her allegations that the hospital breached the standard of care in its care and treatment of Diann Hans. No sworn testimony has been provided that Hans' alleged injuries were the proximate result of any act or


omission by MHG which deviated from the standard of care. In the absence of such expert testimony, Hans cannot establish a *prima facie* case of negligence against MHG. Since Hans cannot establish a *prima facie* case of negligence against the hospital, no genuine issue of material fact exists in this case. The trial court was correct when it granted summary judgment in favor of MHG in this case and MHG would request that this Court uphold the judgment of the trial court.

Respectfully submitted,

MEMORIAL HOSPITAL AT GULFPORT

FRANKE & SALLOUM, PLLC

BY: 

PATRICIA K. SIMPSON, MSB 

FRANKE & SALLOUM, PLLC  
2605 Fourteenth Street  
Post Office Drawer 460  
Gulfport, MS 39502  
Tel: (228) 868-7070  
Fax: (228) 868-7090

## CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served via US mail, postage prepaid, a copy of the above Brief for Appellee Memorial Hospital at Gulfport to the following:


Robert O. Homes, Jr., Esq.  
Post Office Box 500  
Gulfport, MS 39502

William E. Whitfield, III Esq.  
Karen Sawyer, Esq.  
Copeland, Cook, Taylor & Bush  
Post Office Box 10  
Gulfport, MS 39502

George F. Bloss, III Esq.  
Mary Margaret Kuhlmann, Esq.  
Post Office Drawer 160  
Gulfport, MS 39502

Honorable Jerry O. Terry  
Circuit Court Judge  
P. O. Box 1461  
Gulfport, MS 39502

So certified this the 10<sup>th</sup> day of June, 2009.

  
\_\_\_\_\_  
PATRICIA K. SIMPSON

FRANKE & SALLOUM, PLLC  
2605 Fourteenth Street  
Post Office Drawer 460  
Gulfport, MS 39502  
Tel: (228) 868-7070  
Fax: (228) 868-7090

CERTIFICATE OF SERVICE

I do hereby certify that I have this day forwarded via Federal Express, postage prepaid, one (1) original, three (3) copies and a CD of the above Brief for Appellee Memorial Hospital at Gulfport to the Clerk of the Supreme Court.

So certified this the 10<sup>th</sup> day of June, 2009.



PATRICIA K. SIMPSON

FRANKE & SALLOUM, PLLC  
2605 Fourteenth Street  
P. O. Drawer 460  
Gulfport, MS 39502  
(228) 868-7070  
(228) 868-7090 Fax

**CERTIFICATE OF SERVICE**

I, Lisa M. Lizana, secretary to Patricia Simpson, do hereby certify that I have this day mailed, via Federal Express, the original, three (3) copies and a CD of the above and foregoing **Appellee**

**Memorial Hospital at Gulfport's Brief to:**

Ms. Betty Sephton  
Mississippi Supreme Court Clerk  
Post Office Box 249  
Jackson, MS 39205-0249

I, Lisa M. Lizana, secretary to Patricia Simpson, further certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **Appellee Memorial Hospital**

**at Gulfport's Brief to:**

Robert O. Homes, Jr., Esq.  
Post Office Box 500  
Gulfport, MS 39502

William E. Whitfield, III Esq.  
Karen Sawyer, Esq.  
Copeland, Cook, Taylor & Bush  
Post Office Box 10  
Gulfport, MS 39502

George F. Bloss, III Esq.  
Mary Margaret Kuhlmann, Esq.  
Post Office Drawer 160  
Gulfport, MS 39502

Honorable Jerry O. Terry  
Circuit Court Judge  
P. O. Box 1461  
Gulfport, MS 39502

So certified this the 10<sup>th</sup> day of June, 2009.

  
\_\_\_\_\_  
LISA M. LIZANA, Secretary